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[\*Simmons v. Florida Power Corp.\*](#), 89-ERA-28 and 29 (ALJ Dec. 13, 1989)

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**U.S. Department of Labor**  
Office of Administrative Law Judges  
Mercedes City Center  
200 S Andrews Avenue Suite 605  
Ft. Lauderdale, FL 33301

DATE: Dec 13 1989

Case No.: 89-ERA-0028  
89-ERA-0029

In the Matter of

FLOYD (Mitchel) SIMMONS, and  
LARRY SIMMONS, Complainants

v.

FLORIDA POWER CORPORATION, and  
FLUOR CONSTRUCTORS, INC., Respondents

APPEARANCES:

Louis D. Putney, Esq., and  
James D. Clark, Esq.,  
For Complainants.

Louis Sapp, Esq.,  
James R. Wiley, Esq., and  
Michael J. Glymph, Esq.  
For Respondents.

BEFORE: E. EARL THOMAS  
District Chief Judge

### **RECOMMENDED DECISION AND ORDER**

This proceeding arises under Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (ERA or Act) and the implementing regulations set forth at 29 C.F.R.

Part 24. Section 210 provides for investigations, hearings and remedial actions against employers in the nuclear power industry who retaliate against workers who complain about nuclear safety matters.

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Section 210(a) provides the following:

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C.A. § 2011 et seq.), or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

42 U.S.C. § 5851(a).

### **STATEMENT OF THE CASE**

On February 22, 1989 and March 16, 1989, brothers Floyd and Larry Simmons filed complaints under the Act against their former employer, Fluor Constructors, Inc. (Fluor), and Florida Power Corporation (Florida Power). Complainants allege that they have been discriminatorily blacklisted by Fluor and Florida Power on a continuing basis since March of 1988, as the direct result of having engaged in activities protected under the ERA. In their complaints, the Simmons Brothers specifically describe two incidents, occurring on February 13, 1989 and March 6, 1989, which allegedly illustrate Respondents' blacklisting policy.

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The Administrator of the Wage and Hour Division, Employment Standards Administration, investigated Complainants' allegations on behalf of the Secretary of Labor, and found that Respondents had discriminated against Complainants in violation of the Act. Respondents were ordered to reinstate the Simmons Brothers to their former

positions, and to pay back wages and benefits from February 13, 1989, as well as all reasonable costs and expenses incurred by Complainants in bringing this action. The parties were advised of the Director's findings by letters dated April 19, 1989 and April 26, 1989.

All parties objected to this determination, however, and timely requested a formal hearing before an Administrative Law Judge pursuant to 29 C.F.R. § 24.4(d). Prior to the hearing, Fluor and Florida Power formally withdrew controversion of the Director's liability determination. Thus, Respondents continue to contest only the extent of damages to be awarded the Simmons Brothers as a result of the discriminatory blacklisting. A hearing was thereafter held in Tampa, Florida on June 7-8, 1989 on the sole issue of damages, and all parties were afforded a full opportunity to present evidence and arguments relevant to this action. The record closed upon receipt of the final posthearing reply brief on October 25, 1989.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Background**

Although Fluor and Florida Power have conceded liability in the instant case, the history of the relationship between Respondents and the Simmons Brothers, as well as the events leading to these proceedings, remain relevant to any award of damages.

Floyd and Larry Simmons were employed at the Crystal River Nuclear Power Plant, located in Crystal River, Florida, for approximately 17 years. Florida Power owns and operates the nuclear plant, as well as four coal-fired power plants also located at the Crystal River facility. Fluor is currently under contract with Florida Power to provide maintenance services at the nuclear plant on an as needed basis. As work is assigned by Florida Power, Fluor "staffs-up" accordingly, providing the necessary work force to complete the project. Because Fluor's

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operations at the nuclear plant are dependent on sporadic work assignments from Florida Power, the size of Fluor's work force fluctuates considerably depending upon the volume of work so assigned. Thus, no employee is hired on a permanent basis.

The Simmons Brothers were initially hired to work at the nuclear plant in 1971, while the plant was still under construction. Following the completion of the plant in 1978, Complainants were retained as "core" craft employees by the contractors who successively held the maintenance agreement with Florida Power, including the present obligor, Fluor, who took over the contract in 1984. Complainants, therefore, remained consistently employed at the Crystal River site from 1971 until they were laid-off by Fluor on March 30, 1988.

As pipefitters with a special expertise in welding, Complaints' responsibilities over the 17-year period not only included the typical duties of installing and maintaining the plant's piping system and the structures which support that system, but also involved special quality welding in critical areas within the plant on the piping systems that contain high pressure steam and radioactive materials. These "x-ray quality" welds must meet specified standards according to documentation prepared by Florida Power engineers. All are in agreement that the Simmons Brothers were valued employees, with highly respected welding skills.

The professional relationship between Complainants and Respondents, however, began to deteriorate in early 1988 when the events leading to this action began to unfold. In February of 1988, Fluor was assigned a project involving the decay heat pits located in the radioactive control area of the plant. A radiation work permit was issued by the Florida Power Health Physics Unit which, among other things, noted that respiratory protection could be required, since the work was to be performed in a contaminated area.

On February 8, 1988, Complainants were assigned to the decay heat pit project. Pursuant to the radiation work permit, they were provided respirators while working in the contaminated area. However, on the morning of March 16, 1988, Complainants' regular request for respirators was denied by the Florida Power Health Physics Unit who apparently felt protection was no longer needed in that particular area.

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Still concerned about potential contamination, the Simmons Brothers pursued the respirator issue with Florida Power Personnel, and threatened to take the matter to the Nuclear Regulatory Commission (NRC). Florida Power eventually issued the requested protection and Complainants completed the work they had started on the project. Shortly thereafter, Complainants were laid-off on March 30, 1988.

The Simmons Brothers subsequently filed complaints against Fluor under the ERA, alleging retaliatory discharge. Administrative Law Judge Rudolf L. Jansen conducted a full formal hearing of these complaints on August 8, 1988. Although Judge Jansen found that the Simmons Brothers had engaged in a protected activity by reasonably refusing to work without respirators, and had successfully established a *prima facie* case of discrimination under the ERA, he additionally found that the lay-off action would have occurred regardless of any forbidden retaliatory motivation by Fluor, due to business necessity. Judge Jansen found that at the time the Simmons Brothers were laid-off, Fluor's work load under its maintenance contract with Florida Power was diminishing, with corresponding decreasing manpower needs. Thus, drastic manpower reductions were required, including the lay-off of the Simmons Brothers. Since Fluor was able to establish a legitimate, non-discriminatory reason for discharging the Simmons Brothers, Judge Jansen determined that the Act had not been violated and Complainants were not entitled to a remedy. *Simmons v. Fluor Constructors, Inc.*, 3 OALJ 1, 27; 88-ERA,-28 & 30 (ALJ, Recommended Decision and Order, February 8, 1989).

Complainants appealed Judge Jansen's Recommended Decision and order, and that case is currently pending before the Secretary of Labor. Since the Simmons Brothers' complaints of retaliatory discharge have been previously adjudicated, the legitimacy of their discharge is not at issue in the instant proceedings. Complainants now charge that Respondents have violated the ERA, independent of the lay-offs, by refusing to rehire the Brothers when Fluor later increased its work force again after receiving additional maintenance projects from Florida Power. In other words, once the legitimate business purpose for the lay-offs established by Fluor in the prior proceedings before Judge Jansen no longer existed, Respondents violated the ERA by blacklisting the Simmons Brothers in retaliation for their reasonable refusal to work without

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respirators, and subsequent complaints to the NRC and the Secretary of Labor.

### **B. Blacklisting**

The Secretary of Labor has defined the term blacklisting as "[a] list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate ... " *Egenrieder v. Metropolitan Edison Co.*, 85-ERA-23, slip op. at 6, n.6 (Order of Remand by Secretary of Labor, April 20, 1987) (citing BLACK'S LAW DICTIONARY 154 (5th ed. 1979)). Blacklisting an employee, in retaliation for his having engaged in a protected activity, is an express violation of the Act pursuant to 29 C.F.R. § 24.2(b).

Fluor and Florida Power do not contest the charge that a blacklisting policy was instituted against the Simmons Brothers in violation of the ERA, beginning in August of 1981.

Fluor retained three pipefitters following the discharge of the Simmons Brothers on March 30, 1988. Sometime during the first of August 1988, two pipefitters, Billy Weigelt and Ron Renny, were recalled by Fluor, bringing the total number of pipefitters to five. Fluor operated at this level until February 13, 1989 when nineteen new pipefitters were hired to do overhauling work during an unscheduled outage. Twelve more pipefitters were also hired on March, 16, 1989 to help complete the project. While many of these employees have since been laid off, at the time of the hearing in June of 1989, a total of nine remained employed by Fluor: two of the original three who were retained on March 30, 1988; Bill Weigelt and Ron Renny who were the first to be recalled in August of 1988; J. Acker who was apparently recalled in September 1988 following the departure of the original third pipefitter; and four others who were part of the group hired in February of 1989.

At no point following the March 30, 1988 lay-offs did Fluor attempt to recall or rehire the Simmons Brothers when additional manpower was needed. On March 16, 1989, the date twelve more pipefitters were hired, Complainants were specifically referred to

Florida Power by their local union to fill the positions. When they arrived at the Florida Power training facility in Crystal River for badge training before reporting to the plant, George Renshaw, the Fluor site manager, met Complainants as they

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were approaching a group of previous coworkers. As he turned the Simmons Brothers away, Mr. Renshaw stated that he could not rehire Complainants because Florida Power would not allow them to work at the Crystal River facility.

In addition to the specific instances of failing to rehire, Complainants also contend that certain false statements regarding the status of their security clearances were made by a Florida Power spokesman and published by several local newspapers. On May 5, 1986, the St. Petersburg Times, Tampa Tribune, Citrus Chronicle and Ocala Star Banner (Citrus Edition) quoted statements made by Mark Jacobs, speaking on behalf of Florida Power, in articles regarding this case. Mr. Jacobs told reporters that the Simmons Brothers pose an "unacceptable safety and security risk at the Crystal River Nuclear Plant,"I without further explanation. At least one of the reporters interpreted Mr. Jacob's comments as representing the reason why Complainants were laid-off and never rehired. Complainants testified that they have had no problems with safety or security in 17 years of working at the nuclear power plant, and have never been denied a safety and security clearance. The Simmons Brothers were often used for critical welds and had free access, from a security standpoint, to any area in the plant. As with their continuing refusal to rehire the Simmons Brothers, Fluor and Florida Power did not contest Complainants' allegations that these statements were baseless, and were made in retaliation for their having engaged in protected activity, in violation of the ERA, as part of the continuing blacklisting scheme.

Thus as the Respondents have made abundantly clear throughout the hearing record, the only remaining issues to be decided in this proceeding relate to the award of damages to Complainants. More specifically, the parties contest the length of the recovery period, as well as the type and amount of damages to be awarded for this period.

### **C. Period of Recovery**

Although Fluor and Florida Power in essence conceded a blacklisting policy was instituted against the Simmons Brothers as early as the August 1988 rehiring, Respondents argue that the complaints filed on February 22, 1989 and March 16, 1989 are untimely with respect to any discriminatory activities which occurred more than thirty days prior to the filing of the first complaint. The ERA's filing provision requires that complaints

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alleging violations of the Act must be joined with the Secretary of Labor within thirty days after such violation occurred. 42 U.S.C. § 5851(b)(1). Thus, Respondents contend that the recovery period in the instant case should commence with the first violation timely alleged.

Complainants in turn argue that the repeated failure to recall them following their March 30, 1988 discharge constitutes a "continuing violation" of the ERA, evidenced by Respondents' admission to a history of a pattern and practice of discrimination, entitling them to damages incurred as far back as August 1, 1988. The continuing violation doctrine allows otherwise stale charges to be revived and considered together with timely-filed charges if, when taken as a whole, each violation constitutes a pattern or continuing practice of discrimination. The Secretary of Labor has applied the continuing violation doctrine in ERA cases, noting specifically in *Egenrieder v. Metropolitan Edison Co.*, 85-ERA-23, (Order of Remand by Secretary of Labor (April 20, 1987)) that blacklisting may constitute a continuing violation if based on an employee's protected activity under the ERA. By its very nature, blacklisting involves a continuing course of conduct.

The parties entered into a stipulation regarding the recovery period issue at the formal hearing on June 8, 1989. Respondents agreed that Complaints need not prove that a continuing violation in fact occurred. However, Respondents argue that an exception to the continuing violation doctrine applies to the instant case, as articulated by the U.S. Court of Appeals for the Eleventh Circuit in *Roberts v. Gadsen Memorial Hosp.*, 835 F.2d 793, *modified on sua sponte reh'g*, 850 F.2d 1549 (11th Cir. 1988). Respondents argue that under *Roberts*, if Complainants were aware of the prior pipefitter recalls at or near the time they occurred, believed them to be discriminatory at the time, yet failed to timely assert their rights under the Act, the continuing violation doctrine does not allow Complainants a second chance to file following the lapse of the statute of limitations with respect to those violations.

The parties have agreed that if Respondents prevail on their argument that an exception bars application of the continuing violation doctrine to the instant case, the appropriate period for relief extends back only thirty days before the charge challenging the February 1989 recalls. If, however, Respondents do not prevail, all agree that a continuing

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violation occurred and the recovery period should extend back to August 1, 1988.

Since the instant case arises in the Eleventh Circuit, the Court's decision in *Roberts* must be considered. *Roberts* involved an action brought under Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* by a black county hospital employee, claiming that the hospital had discriminated against him on the basis of race in denying promotion opportunities in 1978 and 1981. Although *Roberts*' complaint with respect to the 1978 employment action was not timely filed within Title VII's 180-day statute of limitations

provision, he argued that the two incidents arose out of a pattern or practice of discrimination which constituted a "continuing violation" of his civil rights. The Eleventh Circuit reversed the lower court's finding of a continuing violation, and ordered that the 1978 claim be dismissed as time-barred. 835 F.2d at 795.

In its first opinion in *Roberts*, the Court focused on the lack of a sufficient "nexus" between the two incidents to support the continuing violation argument. 835 F.2d at 800. However, the Court later substantially modified its opinion and held that even assuming such a nexus had been shown and the violation was continuing in nature, Roberts had admitted that he was aware of his rights in 1978, and therefore should have asserted them at that time. 850 F.2d at 1549. The Court noted in reaching its decision that "[a] claim arising out of an Injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the 180-day limitation period." 850 F.2d at 1550. Thus, as Respondents argue, Complainants' knowledge of their rights at the time of the violations, which occurred outside the ERA's thirty-day filing period, is relevant to determining the appropriate recovery period in this case.

Both Floyd and Larry Simmons testified that they had become aware of the August 1988 hirings shortly before the hearing before Judge Jansen on August 8, 1988. The extent of that awareness, however, is at issue.

The record contains portions of testimony given by George Renshaw, Fluor's site manager, on August 10, 1988 at the hearing, conducted by Judge Jansen. Mr. Renshaw confirmed that Fluor had recently hired two pipefitters, Belly Weigelt and Ron Renney.

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Mr. Renshaw testified that the Simmons Brothers had not been recalled because the new work assigned by Florida Power was primarily tubing mechanical work. Since no welding was required, it was more efficient to hire mechanical pipefitters than pipefitters with special welding skills. Mr. Renshaw, specifically noted that "[i]f it were a welding job and involved tubing there's no doubt in my mind I would've brought the Simmonses back ... [i]f I had a welding job out there right now I would have them out there."

According to Judge Jansen's Recommended Decision and Order, Complainants subsequently argued that "the failure of Fluor to rehire them for short-term employment immediately prior to the hearing in this case constituted a black listing [sic] which also can be construed to be unlawful discriminatory conduct under these Regulations." Judge Jansen, however, determined that any such blacklisting would be a separate violation under the Act and was not properly before him for consideration, other than as circumstantial evidence of the unlawfulness of the discharge. *Simmons*, 3 OALJ 1 at 36.

The Simmons Brothers, therefore, clearly knew that Fluor had rehired two pipefitters in August, 1988, at or around the time the rehiring occurred, or at least as early as

August 10, 1998 when George Renshaw testified. It is equally clear from, Complainants' testimony, both at the hearing and by deposition, that they suspected at the time that they had been discriminatorily blacklisted by Fluor, and attempted to assert their rights in the proceedings before Judge Jansen.

Since Complainants were aware of their rights under the Act in August 1988, but failed to properly assert them within the 30 day statutory period, their claim with respect to the August 1988 hirings is time-barred under the Eleventh Circuit's decision in *Roberts*, despite what appears to be a continuing violation by Respondents. As the Court noted in *Roberts*, it is not within the province of the undersigned to neutralize so explicit a Congressional mandate as the thirty-day filing requirement, however repugnant the circumstances. *Roberts*, 350 F.2d at 1551.

In the alternative, Complainants argue, for the first time in post-hearing briefs, that Respondents should be equitably estopped from raising the statute of limitations as a defense. The Simmons Brothers contend that Respondents, through the

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testimony of George Renshaw, misrepresented or concealed the facts surrounding the August 1988 recalls, and "lulled" Complainants into inaction with respect to their claim. The principals of equitable tolling operate independently of the continuing violation doctrine. *Egenrieder*, slip op. at 7.

Equitable tolling has been applied in situations (1) where the complainant has been actively misled by the respondent regarding the cause of action; or (2) has been prevented in some extraordinary way from asserting his or her rights; or (3) has previously raised the exact claim but by mistake was raised in an incorrect forum. *McGough v. United States Navy*, 2 OAA 3, 213, 86-ERA-18-20 (Decision and Order of Remand by the Secretary of Labor (June 30, 1988)). Arguably, in the instant case, Complainants were actively misled by George Renshaw into believing that they had not been blacklisted with respect to the August 1988 hirings, and would be rehired when welders were again needed. In addition, it may be argued that the Simmons Brothers did timely raise their claim of blacklisting before Judge Jansen at the prior hearing, although it was in an "incorrect forum." However, the issues in this case have been intentionally narrowed by agreement of all parties. Complainants agreed by stipulation that should their continuing violation theory fail, the appropriate relief period would begin with the February 1989 violation which was timely charged within the filing period. Thus, Complainants knowingly and intentionally limited their response to Respondents' statute of limitations defense to the continuing violation doctrine, and the defense of equitable tolling has been effectively waived.

Since Respondents have established that the continuing violation doctrine may not be applied in this case a continuing violation has not occurred, despite Respondents' concession that in substance such a discriminatory pattern and practice in fact took place.

See *Roberts*, 835 F.2d at 800. The period for relief must begin with the first violation timely alleged, the February 13, 1989 hiring of nineteen pipefitters.<sup>1</sup>

#### **D. Damages**

Damages under the Act are awarded Pursuant to the provisions of 42 U.S.C. § 5851(b)(2)(B), and the implementing regulations which state as follows:

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If the Secretary concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former or substantially equivalent position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment. The Secretary may, where deemed appropriate, order the party charged to provide compensatory damages to the complainant.

Costs. If such a final order is issued, the Secretary, at the request of the complainant, shall assess against the respondent a sum equal to the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant, as determined by the Secretary, for, or in connection with, the bringing of the complaint upon which the final order was issued.

42 U.S.C. § 24.6(b)(2)-(3).

Complainants request an award of back pay with interest, front pay in lieu of reinstatement, damages for pain and suffering, injunctive relief, and attorney fees and costs.

**1. Mitigation of Damages.** Although not expressly required by the Act or regulations, Respondents contend that Complainants had a duty to mitigate damages by seeking alternative employment following Respondents' refusal to rehire them. The Eleventh Circuit has held, in related employment discrimination cases that an employee who is unlawfully terminated is required to mitigate damages by being "reasonably diligent" in seeking employment substantially equivalent to the position lost. *Nord. v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985).

Although the relevant recovery period begins on February 13, 1989, the efforts of the SinLmons Brothers to find employment following their lay-offs on March 31, 1988 are relevant to the mitigation issue.

Immediately following their discharge, the Simmons Brothers placed their names on a "work list" maintained by their local

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union. As workers are requested from the union, names are taken off the list and referred to the employer according to the order signed. Larry Simmons testified that he continually checked in with the union by telephone on a weekly basis until the first part of 1989. Complainants received their first and only formal referral from the union on March 6, 1989 when they were told to report to the Crystal River Nuclear Power Plant, but were turned away at the gate by Fluor's site manager.

From March 30, 1988 to the present, Larry Simmons testified that he has concentrated his efforts on building his part-time welding business, Freedom Fire, into a successful full-time enterprise. Unfortunately, the business thus far has been less than a success, operating at a loss in 1988. Freedom Fire is a fire apparatus manufacturing business, involving the design and construction of water tank compartments, the repair of piping systems, and the installation of pumps on fire trucks. The business is jointly owned by Larry and his wife, Kathy Simmons.

Larry Simmons testified that on February 21, 1989 he applied to the Lockheed Corporation at Cape Kennedy in Titusville, Florida, where he had previously worked from 1968-69. However, he never heard back from them regarding any openings. He has also applied to the Buckeye Cellulose Corporation in Perry, Florida, which is approximately 120 miles away from Crystal River, for a job involving maintenance work, welding and pipefitting. They also failed to respond. Although he also heard sometime in the latter part of the Summer of 1988 that the nuclear power plant at Turkey Point, Florida needed welders, Larry testified that there was no guarantee that he would be hired. Since the job was located some 300 to 400 miles away from his home, he decided not to further pursue the matter. Larry Simmons' only source of income since March 30, 1988 has come from 26 weeks of unemployment compensation and his welding business.

Floyd Simmons testified that he also sought alternative employment as a welder following his lay-off from Fluor. He was employed as a welder by Florida Aggregated Mines, but quit after approximately three weeks due to unsafe working conditions. Floyd was also temporarily employed by Bargain Time, a local organization, as a carpenter's helper in January of 1989. However, he was laid-off after the job was completed on February 2, 1989.

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In between jobs, Floyd testified that he has worked on occasion for his brother, Larry, helping with welding projects, in return for some monetary compensation and return services from his brother in building a boat trailer. Floyd also earns some income from playing in a band which performs approximately every other weekend; however, he testified that the time spent at this activity continues to be approximately the same as before the lay-off from Fluor. Following the lay-off, Floyd did attempt to start a related

service business in the entertainment field, involving the organization of promotional events. The business, as yet, has been unsuccessful.

Floyd has attempted to obtain several jobs outside the technical welding field. He has applied to be a welding equipment salesperson in Ocala, Florida, but feels he did not get the job because he had to explain why he was not recalled to work at the Crystal River Nuclear Plant. Other applications were sent to a car dealership, a gas station, and an auto care center, without success. Although, all of the jobs paid substantially lower than the wage he was previously receiving at Fluor, Floyd testified that he was willing to take any of the jobs.

Both Brothers feel their job search and businesses have been and will continue to be hampered by the publicity surrounding the events that transpired at the nuclear power plant. Complainants specifically point to the articles published on May 5, 1989 which contained the statements by Mark Jacobs, on behalf of Florida Power, that the Simmons Brothers were considered to be a safety and security risk. According to Complainants, such a label substantially decreases the likelihood of any future opportunities for employment in the nuclear industry, or any other job which requires a safety and security clearance.

Based on the above credible evidence, Complainants have sufficiently established that they have been "reasonably diligent" in seeking alternative employment from the date they were laid-off to the present, which includes the recovery period relevant to these proceedings. Although Complainants' efforts have been largely unsuccessful, it was not from lack of diligence, but rather due to the lack of opportunity within their local communities. Complainants reasonably "lowered their sights" and devoted their efforts to either self-employment or finding alternate employment within the local area, as they anticipated being eventually recalled to work at the Crystal

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River Nuclear Plant when welders were again needed. Following Respondents' refusal to rehire them, Complainants have continued to seek employment, but believe their efforts have suffered from having to explain their inability to return to work at the nuclear plant to potential employers, and from the published statements made by Mr. Jacobs "branding" them as safety and security risks. Since Respondents have offered no other evidence of a lack of due diligence on the part of the Simmons Brothers, Complainants have sufficiently shown that they have done all that could reasonably be expected of them by way of mitigation. *Nord*, 758 F.2d at 1471.

**2. Back Wages.** As stipulated by the parties, Complainants are entitled to an award of back wages, beginning on February 13, 1989, with the number of hours and hourly rate to be computed by the parties. Still at issue, however, is the length of time the Simmons Brothers would have been employed by Fluor had they been rehired on February 13,

1989 or March 6, 1989. Many of the pipefitters hired on these dates have now been laid-off due to subsequent reductions in the work force.

As previously noted, due to the nature of its contract with Florida Power, the size of Fluor's work force fluctuates considerably depending upon the volume of work assigned under the maintenance contract. In February and March of 1989, Fluor hired additional pipefitters to help complete overhaul work, assigned by Florida Power, during an unscheduled outage. As the project was completed, Fluor substantially reduced its work force again between the middle and end of March. As of the date of the hearing nine pipefitters were still employed at the nuclear plant, including four of the workers hired on February 13, 1989.

Jack Gresham, Fluor's current Administrative Manager, testified at the hearing that within a week four more pipefitters would be laid-off, bringing the total number down to five. Mr. Gresham anticipated employing at least five pipefitters for approximately two more months, while some additional "mar" work was completed for Florida Power. Once this project was completed, Fluor anticipated further reducing the number of pipefitters to three. At the time of the hearing, Fluor was projecting a need for approximately two to three pipefitters through November 1989.

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Although impossible to precisely determine, it appears that had Fluor not discriminatorily blacklisted the Simmons Brothers, Complainants would have been rehired in February of 1989 and continued to be employed through the completion of the mar work for Florida Power sometime in August of 1989. Although Jack Gresham testified that Fluor does not recognize the seniority of its employees in making decisions to lay-off and recall, Judge Jansen found in the previous proceeding that Fluor does follow a policy in making these decisions:

The first people to be let go during the concluding period of an outage are the "travelers." Travelers are individuals who work outside of the jurisdiction of their own local union, and who travel from outage to outage between nuclear facilities ... The policy of laying off the travelers first is dictated by a potential grievance problem from the local employees and local unions. Following the termination of the travelers, Fluor's policy is to terminate the individuals in the local union, and after they are gone, the core unit of employees is then reduced if that becomes necessary.

*Simmons*, 3 OALJ 1 at 32.

Having worked at the Crystal River Nuclear Plant consistently for approximately 17 years prior to their lay-off's, the Simmons Brothers were considered "core" employees of the nuclear plant, and thus, part of the last group of craft employees to be considered for lay-off. George Renshaw testified at the prior hearing before Judge Jansen that in making

the decision to lay-off core employees when it becomes necessary, he looks to the leadership ability of the employees to determine who should be retained. Since the Simmons Brothers were not laid off until the total number of pipefitters needed dropped to three, it is reasonable to conclude that they were considered by Fluor to be the top fourth and fifth most valued pipefitters, as argued by Complainants. Since one of the original "top three" pipefitters retained following the discharge of the Simmons Brothers, Mr. Denmark, is no longer with Fluor, it could be argued that the Simmons Brothers would now be considered the top third and fourth pipefitters, had the discrimination not occurred, and thus, would be retained as long as four pipefitters are needed.

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Since Fluor anticipated retaining five pipefitters through the completion of the mar work assigned by Florida Power, the Simmons Brothers are awarded back wages from February 13, 1989 to the date the project was completed and two of the five pipefitters were laid-off. Respondents shall provide documentation of this date during the discussions between the parties regarding the amount of back pay to be awarded.

**3. Front Pay in Lieu of Reinstatement.** Under the Act and regulations, the secretary of Labor must order the party who has violated the Act to take appropriate affirmative action to abate the violation. This action may include the reinstatement of Complainants to their former position with Fluor, or substantially equivalent position, with all of the prior terms, conditions and privileges of that employment. However, reinstatement will be ordered only if "desired" by Complainants. 29 C.F.R. § 24.6(b)(2). The Simmons Brothers have persuasively argued that reinstatement is neither desired nor feasible in the instant case.

Complainants testified that throughout the proceedings involving their employment at the nuclear plant, they have wanted to be reinstated in their former positions. However, following the statements made by Mark Jacobs to the press in May of 1989, the Brothers now feel that Respondents consider them to be a safety and security risk. Complainants feel that if they return to work at the nuclear plant, and something goes wrong, they are likely to be accused. According to Complainants, such feelings of mistrust would effect their ability to perform their jobs.

Although it is difficult to predict how the Simmons Brothers would be treated if reinstated to their former positions, Respondents' past actions with respect to these once highly valued employees provides a reasonable indication. Fluor and Florida Power have made it abundantly clear that the Simmons Brothers are no longer welcome at the Crystal River Nuclear Plant, and have gone to the extent of instituting an illegal blacklisting policy and issuing false statements to the press, Questioning the quality of their work, in order to make their feelings clear to Complainants and the community.

The Simmons Brothers have requested, in lieu of an order of reinstatement, an award of three to five years of "front pay," or

future lost earnings. Although the Secretary of Labor is not specifically authorized under the ERA to award front pay, the language used by Congress in the remedial provisions of the Act is sufficiently broad to incorporate such an award, including the power to order "appropriate affirmative action to abate the violation" and to award compensatory damages where appropriate. 42 U.S.C. § 5851(b)(2)(B); 29 C.F.R. § 24.6(b)(2). Pursuant to these provisions, the Secretary has a duty to place a complainant in the same position he would have been in, had the discriminatory actions not occurred. In essence, the Secretary has a duty to "make whole" the victims of discriminatory conduct.

The Fifth and Eleventh Circuits have approved awards of front pay in lieu of reinstatement, in other employment discrimination cases brought under Acts with broad remedial provisions which also espouse a "make-whole" philosophy. *See e.g. Goldstein v. Manhattan Industries Inc.*, 758 F.2d 1435 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985); *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir.), *cert. denied*, 58 U.S.L.W. 3216 (1989); *Nord*, 758 F.2d at 1473. The Eleventh Circuit in *Goldstein* held that front pay may be particularly appropriate where discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy. 758 F.2d at 1449.

The difficulty in the instant case, as with the award of back pay, is predicting the extent of Complainants' future employment at the nuclear plant, had the discrimination not occurred. Nonetheless, Complainants are entitled to an award of front pay in furtherance of the goals of ending the illegal discrimination and rectifying the harm that it has caused. *See Nord*, 758 F.2d at 1473.

According to Mr. Gresham, Fluor projected a need for a total of approximately two to three pipefitters through November 1989. As of the hearing date, the next time Fluor anticipates a need to hire additional pipefitters is Spring of 1990, when Florida Power has currently scheduled Refuel Seven Outage, provided Fluor's contract with Florida Power is renewed. Mr. Gresham readily admitted, however, that predicting Fluor's workload, and corresponding manpower needs, is difficult since Fluor is dependent on the fluctuating maintenance needs of Florida Power. Such needs are subject to change at any time depending upon unscheduled shutdowns and different types of

emergency situations that can occur.

Fluor's current two-year contract with Florida Power expires on March 31, 1990. Respondents argue that even if the Simmons Brothers would have been reemployed as needed at the nuclear plant, front pay should not be awarded beyond the expiration of Fluor's contract with Florida Power. While it appears that Fluor is not guaranteed a new

contract in April of 1990, it has held the maintenance contract with Florida Power since 1984, and has already successfully renewed the contract on two occasions. Mr. Gresham indicated that Fluor has every intention of retaining this lucrative contract.

In any case, the focus is awarding front pay should not fall on the speculative nature of Fluor's relationship with Florida Power, but rather on Complainant's loss as a result of Respondents' discriminatory activities. Absent the blacklisting policy, the Simmons Brothers could have reasonably expected to have been recalled by Fluor, or any subsequent maintenance contractor at the nuclear plant, on a continuing basis as the need for more than two to three pipefitters arose. Complainants have a 17-year employment history at the Crystal River Nuclear Plant, and have been continually retained as core employees by the contractors who have successively held the maintenance agreement with Florida Power, since they were first hired in 1971. Mr. Gresham agreed that in projects of this nature, certain craft employees, such as the Simmons Brothers, regularly remain on the site working for the new maintenance contractor when an old contract is not renewed. However, since Florida Power has expressed an intention to no longer allow the Simmons Brothers on the Crystal River site, Complainants have not only lost the potential for future employment with Fluor, but also any future chance of employment with any subsequent maintenance contractor at the nuclear plant, as a direct result of Respondents' discriminatory activities. In addition, the statements made by Mr. Jacobs on behalf of Florida Power very, possibly endangered future opportunities with any other nuclear plant, thereby essentially eliminating the Simmons Brothers' livelihood as it existed prior to having engaged in activity protected by the Act.

The ERA was designed to protect such individuals by ordering the abatement of the violation, and compensating the individual for any resulting loss. Although it is impossible to

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place Complainants back in the exact position they were in with respect to their employment status prior to February 13, 1989, an award of three years of future earnings will go far in attaining the goal of making Complainants "whole."

Measurement of these earnings, while difficult due to Fluor's fluctuating manpower needs, is not impossible. Upon the advent of the current maintenance contract on April 1, 1988, Florida Power apparently initiated a "change in philosophy" regarding the maintenance work to be allocated to Fluor. where the previous contract was valued at approximately twenty-one million dollars, the value of the current contract has dropped to approximately six to seven million dollars, reflecting a reduced workload. This new philosophy by Florida Power was accepted by Judge Jansen as evidence of a legitimate reason for the further reduction of Fluor's work force in March of 1988, including the discharge of the Simmons Brothers. Since there is no indication that Florida Power's new philosophy with respect to the maintenance contract will change in the future, Complainants may not be placed in a better position than they were in February 13, 1989

by using their earnings prior to their discharge as a measure of future earnings. If the discrimination had not occurred in February and March of 1989, the Simmons Brothers could only reasonably expect to be occasionally employed by Fluor when additional pipefitters were needed beyond the two or three now retained by Fluor on a more consistent basis.

A more reasonable approach, therefore, would involve using the number of hours additional pipefitters were needed during the first year of the current contract, as a guide to measuring the number of hours the Simmons Brothers could have expected to be annually employed at the nuclear plant on an "on call" basis. As discussed above, had the discrimination not occurred, Complainants would have likely continued to be considered the fourth and fifth most valued pipefitters. At this point, it appears from the record that Billy Weigelt and Ron Renny now occupy those positions. Therefore, the average number of hours worked by these two employees between April 1, 1988 and March 31, 1989, the first year of Fluor's new contract, provides a reasonable standard by which to calculate Complainants' lost future annual earnings. Since the parties have stipulated that they will agree to a reasonable hourly rate with respect to back wages, this amount may also be used to calculate the amount of front pay to be awarded to Complainants. Respondents shall

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provide Complainants with all necessary documentation to calculate this amount, using the method described above.

**4. Intangible Loss.** Complainants also request an award of compensatory damages for certain intangible losses they have suffered as a result of Respondents' discriminatory activities, including emotional pain and suffering, and injury to reputation.<sup>2</sup> The Secretary of Labor is statutorily empowered to award such damages where deemed appropriate.<sup>3</sup> 42 U.S.C. § 5851(b)(2)(B); *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983); *See English v. General Electric Co.*, 683 F. Supp. 1006 (E.D.N.C. 1988), *aff'd*, 871 F.2d 22 (4th Cir. 1989); *Smith v. Atlas off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). Such damages are appropriate in the instant case.

Both of the Simmons Brothers testified that they have suffered a great deal of embarrassment, hurt, humiliation, stress, and loss of self-esteem following the disruption of their employment at the nuclear plant. Such emotional distress has affected not only the Brothers personally, but has affected family relationships and social activities as well. The Simmons Brothers no longer socialize with their previous coworkers, and tend to limit outside activities to avoid questions regarding their situation with Fluor and Florida Power. Both Brothers live in a relatively small community, and the events that have transpired between Complainants and Respondents apparently received a great deal of local attention.

Some of the evidence regarding Complainants, emotional suffering, however, fails to differentiate between the loss which was suffered as a result of the March 30, 1988 lay-offs, and that which occurred as a direct result of the blacklisting activities at issue in these proceedings. Judge Jansen has already determined in prior proceedings that Complainants are not entitled to relief for injuries suffered as a result of the layoffs on March 30, 1988. Dr. Sidney J. Merin, a psychologist who testified at the hearing regarding the current mental health of the Simmons Brothers, related the majority of his findings to "the event, " without ever clearly isolating which event, the discharge or the blacklisting, he felt was responsible. Much of his testimony, therefore, has little relevance to the damages to

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be awarded in this case.

Complainants argue, however, that the hurt suffered due to the lay-offs has continued as a direct result of Respondents' subsequent discriminatory activities. Had the blacklisting not occurred, the emotional pain and suffering caused by losing their jobs would have been alleviated by being rehired, and Complainants would have regained lost self-esteem and the camaraderie of coworkers. However, Respondents' subsequent discriminatory activities only further exacerbated the existing emotional distress.

Larry Simmons also claims injury to his reputation as a result of the published statements made by Mark Jacobs, representing Florida Power, that the Simmons Brothers are an unacceptable safety and security risk at the Crystal River Nuclear Plant. According to the record, Mr. Jacobs had no basis for making such highly inflammatory statements. Larry Simmons has resided in Homosassa, Florida, a small retirement community near Crystal River, for approximately 17 years. He has been very active in the church as well as the local community, serving eight years as the Assistant Fire Chief of the Homosassa Volunteer Fire Department, and serving on the Board of the Homosassa Cub Scout Troop. Mr. Simmons also owns and operates a local business.

Additionally, although Complainants have never been officially denied a security clearance, they feel these statements will have a significant impact on their ability to obtain future employment requiring a security or safety clearance.

The uncontroverted evidence of record sufficiently establishes that Complainants have suffered continued and exacerbated emotional pain and suffering as a direct result of Respondents' discriminatory blacklisting activities, including the statements made by Mark Jacobs. Following the proceedings by Judge Jansen that legitimized their discharge, the Simmons Brothers had a reasonable expectation of eventually being recalled by Fluor. When Fluor and Florida Power subsequently refused to rehire Complainants, and issued statements falsely labelling them as safety and security risks, the humiliation and degradation was complete. Although Larry Simmons did not present direct evidence of injury to his reputation, the implications of

the statements made by Florida Power's representative were clear and are likely to significantly effect Larry Simmons' reputation within his community and the nuclear power industry. In order to compensate Complainants for their respective emotional pain and suffering and injury to reputation, Larry Simmons is awarded a total of \$50,000, and Floyd Simmons is awarded \$30,000.

**5. Affirmative Action.** In addition to ordering the abatement of all discriminatory activities, Complainants request that Respondents be affirmatively ordered to issue a public retraction of all statements made to the news media labeling the Simmons Brothers as safety and security risks, making it clear that no basis for such accusations exists. Since Respondents knew or should have known that the remarks were groundless, and had the potential of ruining the Complainants' careers in the nuclear power industry, Respondents should be required to take all reasonable steps to erase any adverse effect from the statements, including a public retraction.

Furthermore, Respondents will be ordered to refrain from any future action which would hinder Complainants in obtaining employment. Should Fluor or Florida Power be contacted by any individual or entity regarding the failure to rehire the Simmons Brothers or the status of their security and safety clearances, they shall explain that Complainants were not recalled in violation of the ERA, and that the Simmons Brothers were in no way a safety or security risk while employed at the Crystal River Nuclear Plant.

Finally, as requested by Complainants, Fluor and Florida Power shall immediately post notice of these proceedings and their outcome in a conspicuous place where their employees usually congregate, and to provide any requested copy of this Recommended Decision and Order..

**6. Fees and Costs.** Respondents shall also pay all costs and expenses, including attorney fees, reasonably incurred by Complainants in pursuing this matter, in an amount to be agreed upon by the parties. 29 C.F.R. § 24.6(b)(3).

### **ORDER**

Accordingly, it is hereby RECOMMENDED that Respondents, Fluor Constructors, Inc. and Florida Power Corp., be ORDERED to

take the following steps to remedy their violation:

- (1) Immediately abate all discriminatory activities against Complainants, Floyd and Larry Simmons;

(2) Pay to Complainants, Floyd and Larry Simmons, back wages (less interim earnings), in an amount to be determined by the parties, from February 13, 1989 to the date Fluor subsequently reduced its work force to less than four pipefitters upon completion of the work assignment involving "mar" work. Documentation of such date shall be provided by Respondents. Interest shall be paid on the agreed upon sum pursuant to 28 U.S.C. § 1961;

(3) Pay to Complainants, Floyd and Larry Simmons, three (3) years front pay, in lieu of reinstatement. The parties shall calculate the amount of future earnings to be awarded, using the hourly rate for each agreed upon above, multiplied by the average number of hours expended by employees Billy Weigelt and Ron Renny from April 1, 1988 to March 31, 1989, to arrive at the annual lost future earnings of Complainants;

(4) Pay to Complainant, Larry Simmons, the amount of \$50,000 for the pain and suffering he experienced as a result of Respondents' discriminatory activities, and for injury to his reputation and career.

(5) Pay to Complainant, Floyd Simmons the amount of \$30,000 for the pain and suffering he experienced as a result of Respondents' discriminatory activities;

(6) Issue a public retraction of all statements made to the news media labeling Complainants, Floyd and Larry SinLmons, as security and safety risks. Such retraction shall clearly state that no basis for such accusations exists;

(7) Refrain from any future action which would hinder Complainants in obtaining future employment. In so doing, Respondents shall affirmatively ensure that in all references to their failure to rehire Floyd and Larry Simmons, it is clear that Respondents' actions were a violation of the Act, and Complainants were in no way a safety or security risk while employed at the Crystal River Nuclear Plant;

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(8) Immediately post notice of these proceedings and their outcome in a conspicuous place where Respondents' employees usually congregate, for a period of thirty (30) days, and to provide any copy of this Recommended Decision and order requested within this period;

(9) Pay Complainants, Floyd and Larry Simmons, all costs and expenses, including attorney fees, they reasonably incurred in pursuing this matter, in an amount to be agreed upon by the parties.

Should the parties be unable to reach an agreement regarding the amount of back pay to be awarded or the amount of costs and fees to be reimbursed, they shall notify the undersigned within thirty (30) days of the issuance of this Recommended Order, and a supplemental decision deciding the unresolved issues will be rendered.

E. EARL THOMAS  
District Chief Judge

[ENDNOTES]

<sup>1</sup>Since there is no continuing violation, the recovery period may not begin thirty days prior to the filing of the first complaint on February 22, 1989, as stipulated by the parties. The recovery period begins on the date the first timely violation occurred.

<sup>2</sup>The request for compensation for injury to reputation is limited to Larry Simmons.

<sup>3</sup>Since administrative proceedings are not generally the proper forum to test constitutional issues, Respondents' argument that the statutory language allowing the Secretary to award compensatory damages violates their constitutional right to a jury trial will not be addressed, but is preserved for appeal purposes.